TAN YEN YEE & ANOR.

v.

EQUITY FINANCE CORP. BHD.

HIGH COURT MALAYA, MUAR
RICHARD TALALLA JC
[ORIGINATING SUMMONS NO. 24-364 OF 1989]
28 JUNE 1990

LAND LAW: *Lease - Monthly payment - Charge - Whether form 16A or 16B to be used.*

STATUTORY INTERPRETATION: *Lease - Monthly instalments - Charge as security - Whether Form 16A or 16B to be used - "Any sum other than a debt" - Annuity - Rent charge - Ejusdem generis rule - Saving provision of Interpretation Act - Section 242(1), (2) and Schedule to the National Land Code 1965- Section 62 Interpretation Act.*

The 1st plaintiff TYY was the managing director of L; TYY and the defendant E entered into an agreement whereby E loaned money to L for the purchase of machinery and equipment. An equipment lease agreement was executed between E as leasor and L as lessee; commencing 13 August 1987 for 36 equal monthly rentals of RM3,527.78.

The 1st and 2nd plaintiffs were brothers and were registered proprietors of the said land; on 19 August 1987, the plaintiffs executed a charge, in Form 16B of the National Land Code (the Code), as security for the payment of rental under the lease. There was a failure to pay the instalments and E applied for an order for sale. The plaintiffs now apply for a declaration that the charge is null and void as they submit it should be in Form A and not Form B of the Schedule to the Code.

Held:

[1] The payment in the form of rental monthly instalments provided for in the charge falls well within the description of "other periodic sum" in s. 242(2) of the Code. The *ejusdem generis* rule must be applied with caution and subject to the primary rule that statutes are to be construed in accordance with the intention of Parliament.

[2] Even if the defendant did use the wrong form, the charge cannot be said to be null and void under s. 62 of the Interpretation Acts 1948 and 1967. Assuming that Form 16A was the proper form to be used the deviation from it by using Form 16B could not be said to have any substantial effect or be calculated to mislead.

[3] The transaction as embodied in the charge is commonly called a rentcharge and Form 16B was the correct form.

[Plaintiff's application dismissed with costs.]

Cases referred to:

Anderson v. Anderson [1895] 1 QB 749
Quazi v. Quazi [1980] AC 744
Jacob v. Overseas-Chinese Banking Corporation Ipoh [1974] 2 MLJ 161
Bank Bumiputra Malaysia Bhd. v. Mahmud bin Hj. Mohamed Din & Anor. [1989] 1 CLJ (Rep) 326

Legislation referred to:

Interpretation Acts 1948 and 1967, s. 62
National Land Code 1965, Form 16B, s. 242(1)

Other sources referred to:
The Interpretation of Statutes 12th Edn., p. 289
Jowitt's Dictionary of English Law 2nd Edn., p. 110

For the plaintiffs - Lee Buck Heng; M/s. Abdullah A. Rahman & Co.
For the defendant - Julie Lim; M/s. Lim, Han & Teoh

JUDGMENT

Richard Talalla JC:

The 1st plaintiff was the managing director of Lehong Vegetable Oil Industries Sdn. Bhd. (the company). This company carried on the business of oil millers and owned an oil mill at 2½ mile stone Peserai, Batu Pahat, Johor.

Sometime in 1987 the 1st plaintiff approached the defendant for a loan to finance the purchase of machinery and equipment which was required to operate the oil mill. The defendant agreed to provide finance to the company. Subsequently an equipment lease agreement (the lease) dated 13 August 1987 was executed between the defendant as lessor and the company as lessee. Under the terms of the lease the lessee was required to pay rental to the lessor. The commencement of the lease was 13 August 1987 and the term thereof 36 months. The total rental for the term amounted to RM127,000.08. This sum was stipulated to be payable in advance by 36 equal monthly rentals of RM3,527.78.

The 1st and 2nd plaintiffs were brothers. They were the registered proprietors of land held under GM No. 98 for Lot 1130 in the Mukim of Bagan, District of Batu Pahat, Johor (the land).

On 19 August 1987 the plaintiffs executed a charge over the land, it would appear as security for the payment of the rental under the lease.

The charge was in Form 16B appearing in the Schedule to the National Land Code (the Code). By that charge and in express terms thereof the plaintiffs charged the land for the purpose of securing to the chargee a sum of RM 3,527.78 monthly and in consideration of a total sum of RM 127,000.08 'kemudahan pajakan faedah' kepada Lehong Vegetable Oil Industry Sdn. Bhd. There were other terms in the charge. These were contained in an annexure thereto which provided that in consideration of the defendant having agreed to lease to the company the equipment for the rental of RM127,000 payable in advance by 36 equal monthly rentals of RM 3,527.78 the plaintiff covenanted that they would pay on demand to the defendant the sum of RM127,000.08 and until demand to ensure that the borrower would pay the monthly instalments in default of such payment all remaining rentals would become payable by the plaintiffs and/or the company to the defendant and the defendant would become entitled *inter alia* to exercise the rights and powers provided in the charge and by law.

There was a failure to pay the instalments. The defendant then applied to the Land Administrator Batu Pahat for an order of sale of the land.

The plaintiffs now apply for a declaration that the charge is null and void, because, so it is submitted on their behalf, the charge should not be in Form B as it is but in Form A of the Schedule to the Code.

It is provided in s. 207(1) of the Code as follows:

> Every instrument effecting any dealing under this Act shall be in such of the forms in the First Schedule as is specified in relation to the dealing in question in the appropriate Part of this division:

> Provided that the form so specified for any dealing may, so long as the variation is not in a matter of substance, be used in any particular case with such adaptations, alterations or additions as may be rendered necessary by the character of the parties or other circumstances of the case.

Pursuant to s. 242(1) of the Code, every charge to secure the repayment of a debt, or the payment of any sum other than a debt, (in either case, whether the amount in question is to be paid as a lump sum or by instalments) shall be effected by an instrument in Form 16A. Subsection (2) of that section provides that every charge to secure the payment of an annuity or other periodic sum - (a) shall be effected by an instrument in Form 16B ...

Counsel for the plaintiffs made reference to the words "any sum other than a debt" and the bracketed words "by instalments" appearing in subsection (1) and submitted that a leasing facility whereby rental is paid monthly over a specified period as expressed in the charge must fall under subsection (1) as opposed to subsection (2) and accordingly the form that should have been used in this instance is Form 16A. That may well have been so.

Counsel for the plaintiffs then went on to argue that Form 16B should not have been used. Not only that, he argued that it could not be used. In this regard he referred to the wording of subsection (2) and cited Maxwell on *The Interpretation of Statutes,* 12th Edn., p. 289. There it is said that where two or more words which are susceptible of analogous meaning are coupled together, *noscuntur a sociis*. They are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general. Counsel then invoked the *ejusdem generis rule* which is to the effect that where particular and specific words are followed by general words, the general words must be limited to things of the same kind as those specified. For the rule to apply the specific words must constitute a category, class or genus and the general words must not by their nature exclude themselves from the same. Applying this latter rule of interpretation it is argued that the words "other periodic sum" in subsection (2) must be restricted to, and here I use Counsel's own words "payments of the same kind or nature as an annuity that is to say payments falling within the genus of annuity.

Reference was made to *Jowitt's Dictionary of English Law,* 2nd Edn., at p. 110:

> Annuity, a yearly payment of a certain sum of money granted to another in fee, or for life, or for a term of years, either payable under a personal obligation of the grantor or charged upon his pure personalty, although it may be made a charge upon his freehold or leasehold land, in which latter case it is commonly called a rentcharge.

It was submitted in this latter regard that a quarterly or monthly payment towards the annuity is an instance of "a periodic sum" as described in subsection (2) but such periodic sum cannot include monthly rental payable under a lease as that rental does not fall within the genus of annuity.

It was further argued that since the charge was in the wrong form and the word "shall" is used in s. 242(1) in reference to the type of form to be used, the failure to use the correct form is fatal and therefore the charge must be declared to be null and void.

As I see it the lease of the equipment was for 36 months which is synonymous with 3 years and payment of rent was on a monthly basis. An annuity by its name itself is a yearly payment of a certain sum of money granted to another for a term of years. It cannot be denied that an annuity is a periodic payment nor can it be refuted that the charge was to secure the payment of a periodic sum, the only difference between the two being that the former constitutes a yearly payment whereas the latter provides for monthly payment.

Incidentally there may be cases where an annuity is payable, not in mass at one time, but by instalments every year or aliquot part of a year. See *Jowitt's Dictionary* abovestated at p. 111. Such being the case it seems to me that the payment provided in the charge in this case falls well within the description of "other periodic sum" appearing in subsection (2) of s. 242 of the Code. My view is fortified by the admonition that the *ejusdem generis* rule must be applied with caution and subject to the primary rule that statutes are to be construed in accordance with the intention of Parliament. See *Anderson v. Anderson* [1895] 1 QB 749 CA at p. 753.

There are only 2 forms of charge provided in the Code, Form 16A and Form 16B. By reference to these forms which appear in the first Schedule to the Code they are to secure payment of, in the case of the former, a principal sum, and the latter a periodic sum. The argument advanced on behalf of the plaintiffs is tantamount to a proposition that a charge under the code to secure payment of a periodic sum, other than a principal sum, is limited to an annuity payable in mass yearly or by aliquot part of a year. I do not consider that that was the intention of Parliament.

It would appear that for the *ejusdem generis* rule to apply there must be a genus and one specific word, as in this case, does not constitute a genus. See *Quazi v. Quazi* [1980] AC 744.

Even if the defendant used the wrong form, which I do not think it did, the charge cannot be said to be null and void. Section 62 of the Interpretation Acts 1948 and 1967 provides that any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead. It appears to me that in this case, assuming that Form 16A was the proper form to be used, the deviation from it by using Form 16B could not be said to have any substantial effect or be calculated to mislead. In this regard I am supported by the decision of Suffian LP in *Jacob v. Overseas-Chinese Banking Corporation, Ipoh* [1974] 2 MLJ 161 at p. 163, which decision was followed by Peh Swee Chin J in *Bank Bumiputra Malaysia Bhd. v. Mahmud bin Hj. Mohamed Din & Anor*. [1989] 1 CLJ (Rep) 326.

The view I take is that the transaction embodied in the charge is as abovestated commonly called a rentcharge and Form 16B was correctly used.

Accordingly the application is dismissed with costs to be taxed.

Also found at [1990] 2 CLJ 857